United States Court of Appeals for the Second Circuit



BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT Docket No. 75-6091

RICHARD J. DE FINA,

PLAINTIFF -APPELLANT,

DEPARTMENT OF TRANSPORTATION, et al., DEFENDANTS-APPELLEES: 1

RICHARD J. DE FINA,
PLAINTIFF-APPELLANT,

VIRGINIA M. ARMSTRONG, et al., DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,

PLAINTIFF-APPELLANT,

CLARENCE M. KELLY, et al., DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,

PLAINTIFF-APPELLANT,

RITCHEY WILLIAMS, et al., DEFENDANTS-APPELLEES.

APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

> MADELINE DE FINA, ESQ., Attorney for Plaintiff-Appellant, 220-31 Union Turnpike, Flushing, New York, 11364. (212) GR 9-1555

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PLAINTIFF-APPELLANT,

DEPARTMENT OF TRANSPORTATION, et al.,
DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,
PLAINTIFF-APPELLANT,

V.

VIRGINIA M. ARMSTRONG, et al.,
DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,
PLAINTIFF-APPELLANT,

CLARENCE M. KELLY, et al.,
DEFENDANTS-APPELLEES.

RICHARD J. DE FINA,
PLAINTIFF-APPELIANT,
V.

RITCHEY WILLIAMS, et al.,
DEFENDANTS-APPELLEES.

BRIEF FOR THE PLAINTIFF-APPELLANT

What Is Being Appealed

Plaintiff-appellant appeals from the judgment of District Judge Knapp, entered on the 20th day of May 1976, consolidating plaintiff-appellant's four actions: 75 Civ 1526, 75 Civ 1564, 75 Civ 2119, 75 Civ 2362 with

his attorney's one action, 75 Civ 2681. 75 Civ 2681 is not being appealed.

Plaintiff is appealing the following Orders signed by District Judge Knapp of the Southern District Court: Order # 43951 dated February 23, 1976; Order # 44076 dated April 19, 1976; Order # 44268 dated April 19, 1976 entered only as to 75 Civ 2362; Order # 44269 dated April 19, 1976 filed in 75 Civ. 1526, but pertaining only to plaintiff's action 1964. 75 Civ. 1526

Plaintiff-appellant is appealing the denial of his Motion for undeleted files and a temporary injunction (June 12, 1975) and the consolidation of this Motion with another Motion made in 75 Civ. 1564, dated, June 10, 1975.

Plaintiff-appellant is appealing the consolidation of this action (1526) with 75 Civ. 2119 on August 4, 1975. Plaintiff had not opposed consolidation. November 6, 1975 plaintiff came into possession of material that the F.B.I. had been building up a derogatory secret file on his attorney since 1932, years before he was born. Plaintiff immediately made a motion instanter November 6, 1975 submitting deleted information given by the F.B.I. to his attorney and requested Judge Knapp for an injunction in his action, discovery, a speedy trial and other relief.

75 Civ. 2119

November 26, 1975 plaintiff made a Motion returnable December 5, 1975 at 2 p.m. for oral argument, a decision on his Motion of November 6, 1975; and for discovery, and an injunction against the F.B.I and the other defendants from going behind a legal adoption of the plaintiff-appellant in 1938 when he was two years of age.

The day before the Motion was returnable plaintiff and his attorney received letters stating that there would be no oral argument on plaintiff's Motion, which was returnable on December 5, 1975. Furthermore, plaintiff and his attorney were ordered to stay away from Judge Knapp's Chambers and his staff.

On or about December 23, 1975, there was confusion about the entry of these Motions on the docket sheet and plaintiff's attorney was told by the docket clerk, Dorothy Fantano, that plaintiff's attorney would have to go up to Judge Knapp's Chamber and bring down certain papers or corrections would not be made.

Plaintiff's counsel went to Judge Knapp's chambers and was threatened with arrest for disobeying Judge Knapp's letter, which was considered an order, to stay away from his Chambers.

Plaintiff is appealing the above tactics of Judge Knapp which resulted in plaintiff-appellant notifying Judge Knapp that he was once more pro se and Madeline De Fina, Esq. was no longer representing him.

March 1, 1976, the Motions made on November 6, 1975, and on December 5, 1975, were marked by Judge Knapp as "withdrawn as moot."

75 Civ. 1526, 1564, 2119, 2362

February 6, 1976, plaintiff-appellant acting,
Pro Se, (see supra) appeared to argue the motion to compel the appointed Magistrate, Sol Schreiber, to report,
why he withdrew and refused to hold a hearing on October 9, 1975.

Plaintiff informed Judge Knapp that he was not a lawyer and could not think what to say. Judge Knapp stated that "We will do the thinking for you."

March 1, 1976 this motion was marked "with-drawn as moot." The biased and prejudicial treatment of the plaintiff-appellant denied him due process of law.

75 Civ. 1564

Plaintiff-appellant is appealing the denial of his motion returnable on April 9, 1976 to obtain the report of the Drug Enforcement Administration of their investigation from July 19, 1973 to December 10, 1973. Plaintiff rejects the Court's redacted report from the Bureau of Namotics and Dangerous Drugs dated from March 29, 1973, to April 2, 1973, which omits from February 21, 1973 (when plaintiff-appellant was accepted by the Bureau of Narcotics and Dangerous Drugs after tests and an interview) to May 10, 1973 when Elizabeth

May, employee of United States Civil Service Commission, crossed out A (accepted) and wrote NS (mot selected). The redacted report also omits the period of time from May 10, 1973, to July 19, 1973, when interviews and communication were had with plaintiff-appellant, his attorney, defendant, Monastero, defendant, Virginia Armstromg, Congressman Rosenthal and others.

Plaintiff-appellant is demanding all the above documents under 5 U.S.C. 552 and 552a.

75 Civ. 2362

Plaintiff-appellant is appealing the confusion and errors of law resulting from consolidating his sction 75 Civ 2362 with his attorney's, Madeline DeFina's, 75 Civ. 2681. The defendant ITT and the defendant Minogue made a motion returnable February 27, 1976, that in 75 Civ. 2681 Miss De Fina did not properly serve the defendant Minogue. There was no issue. The Marshal served Minogue by certified mail in New Jersey and it was conceded that Minogue was living in California at the time. In addition, Government Counsel was asserting that Miss De Fina did not exhaust her administrative remedies. Here again there was no contest.

Neither was true in plaintiff-appellant's case 2362. Minogue was properly served personally in California, and plaintiff-appellant had exhausted his administrative remedies.

February 26, 1976, Judge Knapp issued order#43963

in the case of 2681 only (plaintiff's attorney's case).

Judge Knapp marked the motion of ITT and Minogue in

2681 "withdrawn as moot."

Plaintiff, Madeline De Fina, in her action 2681 made a motion and as a result Judge Knapp issued order # 44076 that a hearing would be held only on the question of Minogue's service in 2681 on April 9, 1976, but entered # 44076 in all of plaintiff-appellant's cases.

Judge Knapp on April 19, 1976 issued two memorandums and orders #44268 and #44269 and consolidated both orders by making them "supplemental" to each other; then he dismissed both actions 2362 and 2681 on the same ground: lack of personal jurisdiction and added that New York's "Long Arm Statute" did not apply.

The confusion of the law and facts in these two separate and distinct cases constitutes reversible error.

Statement of the Case

75 Civ. 1526

(1) The Nature of the Case

On or about March 27, 1975 the plaintiff-appellant (hereinafter referred to as Richard J. De Fina) instituted this action Pro Se. The complaint was amended on the 30th day of May (JA3) 1975.

The amended Complaint is twofold: 1. as against the Department of Transportation Federal Aviation Administration for an injunction and for the undeleted files and destruction of same. As against the Federal

agencies there is no demand for money damages. 2. as against the individual defendants (a request to amend "John Doe" to Dr. John P. Skelly, F.A.A., Kennedy Airport, Jamaica, New York, was made in paragraph 11 of the Memorandum for Pre-trial Conference on September 16, 1975 (JA4) and ignored by Judge Knapp) damages in the sum of \$700,000 for the violation of Richard J. De Fina's rights to equal employment opportunities with the Federal Government; for the violation of his rights under the Veteran's Preference Act; under the Fifth Amendment of the United States Constitution (Due Process of Law); for the violation of his Civil Rights and rights under the Freedom of Information Act(see amended complaint) (JA3).

Dr. Skelly has violated Richard J. De Fina's right to privacy by sending a false telegram to the Veteran Administration to cover up the fact that the federal Aviation Administration had the medical files illegally since June 1974(see Pre-trial Brief-paragraph 15).

These Federal defendants, acting outside the scope of their authority and duties, caused Richard J.DeFina to be blacklisted and put into a "62" file, and as a resulthe is now barred from ever obtaining Federal Employment. Richard J. De Fina is asking the Court to correct and revise the erroreous judgment entered against him "with rejudice" by District Judge Knapp.

On May 23, 1975 plaintiff-appearant, acting Pro-Se made a motion to amend the complaint to named defendants, Feldman and Churchville. The motion was granted(JA3).

Richard J. De Fina went to the marshal to serve the defendants, Feldman and Churchville, and filled out in his handwriting the forms for the marshal to serve the defendants, Feldman and Churchville, individually. A person in the marshal's office crossed out Feldman and Churchville (see filed Notice of Service JA3) and served for the third time the Department of Transportation Federal Aviation Administration.

Government counsel refused to specifically name the defendants that he was appearing for (JA3) and it has been assumed as a fact, that Churchville and Feldman have appeared in this action by the United States Attorney's answer(JA3).

Richard J. De Fina was forced to act Pro Sebeing unemployable, due to the falsified files created
by the defendants. Free legal aid was denied to him,
and private attorneys who would represent him quoted
fees completely beyond his means; thus plaintiff-appellant
being unemployable due to the false Federal records could
not retain private counsel and free legal counsel was
denied to him when he sought it. As a result Richard J.
De Fina was taken advantage of, and thus Richard J. De Fina
was denied due process of law.

(2) Facts in 75 Civ. 1526

On November 8, 1974, Richard J. De Fina received from the defendants a letter of availability dated November 7, 1974, offering to Richard J. De Fina employment as an electronic technician. Believing it was an offer made in good faith he accepted and mailed out forms to the Federal Aviation Administration(affidavit of Richard J. De Fina in opposition to Government's motion to consolidate and dismiss).

Richard J. De Fina was unaware that this was a repetition of what the Federal Aviation Administration and the Civil Service Commission, hereinafter referred to as CSC, had done in 1973.

In 1973 Certificate #1863 was sent by the CSC to the Federal Aviation Administration, hereinafter referred to as the FAA, with Richard J. De Fina's name on it. Without notice to Richard J. De Fina a selection was made and Richard J. De Fina was "non-selected."

The same thing happened on June 24, 1974, when Certificate #4424 had selected someone as electronic technician and made it appear that Richard J. De Fina had also been considered and was "non-selected."

"CSC-NY found that FAA had appointed a non-veteran and non-selected a veteran, namely, Mr. De Fina. FAA was contacted on Novembet 7, 1974 and told that in view of its selection of a non-veteran, an objection or reason for passing over a veteran had to be submitted to the CSC with respect to Mr. De Fina.

On February 3, 1975, the CSC-NY reviewed and sustained the reasons submitted by FAA for not selecting Mr. De Fina. Mr. De Fina's name was therefore removed from the certificate issued to FAA on June 24, 1974. The reasons submitted by FAA were based on information furnished by former employers of Mr. De Fina in response to employment inquiries sent to them by FAA. This employment information was received by FAA under an explicit promise of confidentiality."(affidavit of defendant Armstrong-page 3).

Unaware of the above Richard J. De Fina did as the defendants told him to do. He was interviewed and strangely while Doctor Skelly spoke to Richard J. De Fina they asked him to go to a private doctor, which he did, and paid \$15 for an examination. He also gave permission to send out inquiries to former employers, and to interview friends, acquaintances, and others. He permitted himself to be fingerprinted and on November 14, 1974 gave the defendants, including Dr. Skelly, authorization to obtain his medical records from the Veteran Administration affidavit of Richard J. De Fina-p. 7-opposition to Government's motion to consolidate and dismiss).

Assistant United States Attorney Gerber by letter dated July 23, 1975 stated that the VA medical files had been in the possession of the FAA since June 1974; five months before Richard J. De Fina gave permission to the FAA to send for his VA medical records. He sent some medical records. Most of the documents were illegible, except for the false, libelous matter that was to have been expunged (september 7, 1971) by the Veteran Adminis-

tration. This false, libelous matter was clear and mass produced in the documents received from AUSA Gerber.

The defendant employees of the FAA claimed that due to non-receipt of Richard J. De Fina's medical files from the VA:

"Richard J. De Fina's appointment was being held up and on December 9, 1974, Richard J. De Fina phoned Mr. Santor, an attorney for the VA. This attorney informed Richard J. De Fina that his medical file would not be released to the FAA as Richard J. De Fina was not applying for an Airman Certificate. When Richard J. De Fina told this to the FAA they agreed and stated it was a "mistake" to ask for the VA file and on December 12, 1974, Richard J. De Fina revoked his authorization to send the files to the FAA. At this point both the FAA and the VA were insisting that the files were not given to the FAA.

At the time for the candidates selected to be sent away on the training course at Okla City, Okla., was near and Richard J. De Fina had not heard he called the FAA on January 8, 1975. Richard J. De Fina was told he was not hired. As this was the pattern for years Richard J. De Fina's attorney phoned the FAA and Burtness read the criminal statute to her and stated Richard J. De Fina was guilty of violating section 1001 of 28 USC." (affidavit-Richard J. De Fina in opposition to Government motion to consolidate and dismiss-p.8).

Richard J. De Fina demanded the names of the employers who gave the contradictory statements and they were denied to him.

Richard J. De Fina called CSC and demanded the right to be heard. It was demied to him. He wanted the right to be heard. It was denied to him(Richard J.DeFina's affidavit in opposition to Government's motion to consolidate and dismiss-p.8).

Mr. Burtness, Chief of the Manpower Division,
Federal Aviation Administration, stated that after
Mr. De Fina gave authorization to obtain his (Richard
J. De Fina's) medical records from the VA(the date of
the authorization was Nov. 14, 1974) the FAA obtained the
medical records from the VA and the records were returned
to the VA. Mr. Burtness's affidavit states that the se
records were not used by the Federal Aviation Administration because Mr. De Fina, in fact, had not applied for
the position of Air Traffic Control Specialist and all
records were returned to the VA at its request. "(Burtness's affidavit-p. 3).

AUSA Gerber's letter to Richard J. De Fina's attorney, dated July 23, 1975, states that the FAA and the VA told him to send the medical records (which were illegible and mostly missing) to Richard J. De Fina, which records had been in the possession of the FAA since June, 1974.

Mr. De Leo, counsel for the VA, in his affidavit states that AUSA Gerber released these records to Richard J. De Fina on July 23, 1975 (affidavit De Leo-p.4). Furthermore, Mr. De Leo's affidavit states that the VA can release this information "without the veteran's consent" (affidavit John De Leo-p.5).

The VA did not comply with the FOIA demand to this day. The VA still withholds from Richard J. De Fina very

important medical records on Richard J. De Fina's acute sinus condition treated at the hospital with penicillin, while he was in the U.S.A.F.. The penicillin treatment almost killed him and left him legally blind with 20/400 vision which can be corrected to 20/20 with glasses.

Judge Knapp stated on April 9, 1975 during a hearing on a motion by Government in 75Civ. 1564 that counsel could get these records from the VA under 5USC552a. Such a demand was made to the VA in Oct. 1975.

Richard J. De Fina and his attorney went to the VA, but the missing medical records(supra) were not in his file. However, the libelous statements that were to have been expunged from the VA records had about a dozen reproductions in the file. Richard J. De Fina was told by members of the VA that a search would be made and if the missing medical records were found he would be notified. Richard J. De Fina is still waiting.

According to defendant Armstrong's affidavit

(supra) it was discovered that the FAA had violated

Richard J. De Fina's rights under the Veteran Preference

Act and this had to be corrected(affidavit-Armstrong-p.3).

It then became necessary to contact Richard J. DeFina

to get him to sign the necessary authorizations for a

cover up of the violation of the Veteran Preference Act.

A job offer was immediately made to Mr. De Fina. Richard

J. De Fina not knowing that there was no job signed all the necessary authorizations to send out inquiries to former employers.

The inquiries were returned and according to Burtness (affidavit-p.2) he received 26 inquiries back, but gave only 20 to CSC. Burtness makes it appear in his affidavit that these inquiries were mailed out in June 1974, an untrue statement (affidavit-Burtness-p.2). A demand for these employer inquiries was made under the FOIA and Burtness refused to comply (Burtness-affidavit-p.4).

A demand was made to Washington and defendant Churchville sent some of the forms to Richard J. De Fina. In some unknown way there was a failure to delete the dates on four of the documents sent to Richard J. De Fina by Churchville. The deleted inquiries, which were not deleted as to dates, read: (1) Dec. 1974 (2) Dec. 16, 1974 (3) Dec. 1974 (4) Dec. 16, 1974.

These employment inquiries were obviously sent out after November 8, 1974 and were received back in Dec. 1974; the sole purpose being to cover up the violation of Richard J. De Fina's rights under the Veteran's Preference Act.

The objections sustained are absolutely false and can be proven false by Richard J. De Fina.

Richard J. De Fina has an Associate Degree and

has earned about 80 college credits.

He has been highly recommended by many of his employers and was considered "over-qualified" when he was interviewed by the FAA in Nov. 1974.

Richard J. De Fina despite his high qualifications cannot overcome the records made against him secretly by the FBI, CSC, HCUA, and HCIS (see JA 9).

Nature of the Action

75 Civ. 1564

This action was started against the CSC on March 31, 1975, when under the FOIA Richard J. De Fina received three attachments of deleted material from the defendant Virginia Armstrong.

One of the attachments was the objections filed by the FAA and sustained by the CSC and Richard J. De Fina adopts by reference all of this brief pertaining to his action 75 Civ. 1526 to this action 75 Civ. 1564 from page 1 to page 15.

on May 14, 1975 Richard J. De Fina received 47 pages from the defendant Drummond and amended his complaint (JA 8) from the CSC only under FOIA(5USC522) to individuals acting outside the scope of their duties. From these defendants Richard J. De Fina is asking \$1,000,000. From the CSC Richard J. De Fina is not asking for money damages only his rights under 5USC552 and 552a; and under the Veteran's Preference Act; and that he be re-instated in his position with the Customs

Department; and to be re-instated to the CSC register in good standing; and to correct and/ or expunge all false, defamatory statements, and to expunge completely pages 11 and 12 of the 47 pages sent by defendant Drummond.

In Richard J. De Fina's Pre-trial brief (JA 4) paragraph 22 there was a request to amend paragraph "FIRST" of the Amended Complaint(JA3). The typist omitted the words sent by the defendant, Robert J. Drummond, Jr., and received by the plaintiff on May 14, 1975. And the typist typed June 10, 1973 for December 10, 1973.

Judge Knapp ignored the request to amend and Richard J. De Fina requests that paragraph "FIRST" be read with the requested amendment as follows:

"FIRST: On or about March 24, 1975, the defendant, Virginia M. Armstrong, sent to plaintiff Ex A, and B, sent by the defendant Robert J. Drummond, Jr. and received by the plaintiff on May 14, 1974, attached hereto, which exhibits contain highly libelous statements against the plaintiff among which libels contains a statement, that statements plaintiff made "proved" to be false statements and "subject to the penalties as described...in the U.S.Code, Title 18 Sec. 1001. That defendant, VIRGINIA M. ARMSTRONG, with others ignored that part of the Veterans' Preference Act which gives the United States Civil Service Commission the right to "require more detailed information in support of the passing over of the preference eligible"

which plaintiff is. The Veterans Preference Act also gives the preference eligible the right to review the reasons, which the defendant, Virginia Armstrong, has refused to do. The defendant, Armstrong acting in concert with other members of the Civil Service Commission sustained a wrongful false and malicious libel concerning the plaintiff while the plaintiff was demanding to be heard regarding the libel. The defendant, LaRocco libeled the plaintiff in a letter dated December 10, 1973 and the defendant Monastero libeled the plaintiff in a letter dated June 4, 1973. Both defendants, LaRocco and Monastero may have repeated these libels against the plaintiff in the 47 page report received by the plaintiff May 14, 1975 from defendant Drummond."

Defendants were served by certified mail by the marshal's office, although Richard J. De Fina acting Pro Se instructed that the summons be served personally. Acting Pro Se again caused others not to do as he requested.

Government did put in an answer for the "defendants" and refused to name the defendants he represented. Judge Knapp decided in favor of these defendants and dismissed Richard J. De Fina's action against the individual defendants "with prejudice."

Defendant, Donald J. Biglin, (amended somplaint (JA 8) sued under the FOIA for injunctive and equitable

relief under 5 USC 552 and 552a. No money damages are being sought from the federal agencies and the Federal Tort Claims Act is not applicable.

Defendant Armstrong is being sued for acting outside the scope of her authority or duties in circumventing and violating Richard J. De Fina's rights to federal employment in Civil Service over the years; concealing and denying anything derogatory was in Richard J. De Fina's Civil Service files.

She deliberately concealed the truth as to the FBI records, the HCUA, and HCIS, and other derogatory false records. Appeals were taken and denied with no right to a hearing or information. Defendant Armstrong created, and/or maintained the falsified records to the end that Richard J. De Fina would never be employed by the Federal Government and finally blacklisted him with a "62" file.

About Oct. 1973, a Mr. Shields, allegedly investigating for the defendants La Rocco, Monastero, and the CSC, came to the home of Richard J. De Fina and spoke to his attorney and legal sister, Madeline De Fina. He stated that Richard J. De Fina was being considered for a civil service job with the DEA and he wanted to interview her.

At the time, Oct. 1973, there was no civil service job that Richard J. De Fina was being considered for, but Miss De Fina was deceived and believed it was a true investigation and allowed herself to be interviewed by Mr. Shields. (JA 8-amended complaint Ex. C p.p.ll-12). The result was the attached two pages 11 and 12 of the 47 pages sent to Richard J. De Fina. As can be seen by reading the ridiculously defamatory, false two pages, Mr. Shields came only to speak to Miss De Fina so that he later could make reports that he had "corroborated" what the false files stated including the United States Court of Military Appeals, the FEI, the CSC, ITT, HCUA, and HCIS, and the others.

These two pages must be expunsed. They are false, derogatory and destructive to Miss De Fina, an attorney, and to Richard J. De Fina.

Page 11-there is a false statement that Richard J. De Fina did "leg work" as Miss De Fina was no longer able to walk or get around. To the present day there is absolutely no truth in this statement.

Page 11-the statement "Life has been very unkind to Richard. He has had many fatal blows..." is attributed to Miss De Fina. Miss De Fina never made that statement. The statement is falsely claimed to be hers. A little further on page 11 Mr. Shields went into a false scenerio about Kings Point and claims that Miss De Fina said, "Rather than fight the Academy, I told him to resign." Miss De Fina never made that statement. As a matter of fact the Commander told Richard J. De Fina to resign to qualify for a vacant technician's job and when Ric-

hard J. De Fina did he was told that there was no vacant technician's job.

Page 11-2nd paragraph contains completely false statements. Miss De Fina is supposed to have said Richard J. De Fina was "too patriotic" and he should at least finish high school before he entered the service. As a matter of fact Richard J. De Fina did not enlist in the Air Force until almost 3 years after he graduated from high school.

He graduated from high school in January of 1953, and enlisted in the Air Force in December, 1955 almost three years later. Moreover, Richard J. De Fina did not enlist to get into some "special program" whereby "he would be permitted to go to school," as Richard J. De Fina left college to enlist; to do his duty instead of waiting to be drafted.

Page 11-paragraph 3 claims that Miss De Fina stated that after Richard J. De Fina enlisted he was first sent to England and "you know you cannot go to college in England." This is too ridiculous to comment upon except to say that Richard J. De Fina did not go to England first, but to Germany, for a few years, then to England, and so there could have been no "bad breaks" for the details Mr. Shields recorded never took place. Moreover, Madeline De Fina never said "his employment history is replete with this sort of thing" Mr. Shields stated that Richard J. De Fina worked in defende plants and they are short term jobs, which

is true.

Miss De Fina never stated that, "he was broken in spirit and health" when he got out of the Air Force, nor did she ever discuss Richard J. De Fina's general bad health. He was healthy at the time and did not "stay home from school for awhile," but he was permitted to go from the Air Force into college, by arrangement with the Air Force.

Page 11-Miss De Fina never made the false statement Mr. Shields claims she made about ITT. She never threatened to sue ITT if they ever said anything about Richard J. De Fina.

Page 12-paragraph 2-Miss De Fina never made the statement that she had a "breakdown" and was "institutionalized for a period of time." Miss De Fina never had a "breakdown" and never was "institutionalized for a period of time." Moreover, Miss De Fina never said that she married a "fiend."

Page 12-the rest of page 12 is unfit to go into except to ask this Court to order these two pages expunged; especially that part at the bottom of page 12 which reads, "I never made any friends in the government, I have always been fighting the establishment."

Nothing more was needed but that statement to keep

Madeline De Fina where they put her in the Un-American files and to make her a secrity risk.

The Facts

75 Civ. 1564

Richard J. De Fina of excellent reputation not wanting to wait until drafted left college and enlisted in the Air Force at age 19 in December, 1955.

Richard J. De Fina in 1958 suffered from acute frontal sinusitus and in treating this condition the doctors in the Southorpe Hospital in England gave him penicillin poisoning(see motion dated 11/6/75(JA11).

While playing and practicing on the Air Force tennis team Richard J. Defina suffered from a strain and asked to be treated with penicillin. When Richard J. De Fina saw his VA medical files for the first time in 1971 he saw that military doctors had put down he had go_____and was treated with penicillin. At the hearing on April 10, 1971 at the VA Richard J. De Fina was told this record would be expunged from the VA medical files.

The hearing was on the right of Richard J. De Fina to a disability for the fissure he suffered due to the malpractice of military doctors. A fissure he still suffers from. This fissure created by the military doctor's malpractice gave Richard J. De Fina the disability preference in federal employment. Richard J. De Fina also became legally blind in the Air Force his vision going from 20/200 to 20/400 while suffering from the sinus condition. This condition the VA still refuses to recognize.

In September 1959 the United States Air Force gave Richard J. De Fina a release from active duty and put him in the Reserves to attend college.

Richard J. De Fina graduated with an associate degree in electronics. For years he could not obtain even an offer of employment from the Civil Service Commission.

One day he took a walk in test for a sky marshal position, passed and went to the training school.

A few days before graduation he was told that his eye sight did not meet the standards and he would have to resign. However, others had eye sight perhaps worse than he has as his vision can be corrected to 20/20.

After resigning he appealed to the CSC for a hearing believir something was wrong. Richard J. De Fina was denice hearing, but was given a "Library Technician's" position at Kings Point, with the understanding that he had charge of some of their electronic equipment.

As the days went on he found that he could not work on the electronic equipment and would have to resign and reapply, and would then get the vacant technician's position.

Believing the Commander he resigned and tried to re-apply for the position to be told he could not.

More appeals were made to Civil Service Commission,

but the abusive treatment of the defendant, Armstrong, was such as to make Richard J. De Fina and his counsel know something was wrong.

Plaintiff's attorney went to a Congressman Rosenthal to investigate the treatment Plaintiff was receiving from the USCSC. She had been told by others that there was something derogatory in plaintiff's file and only a Federal Judge could get plaintiff to be hired by civil service. The ones who told her this refused to say more. (see affidavit Richard J. De Fina in opposition to Government's motion to consolidate and dismiss-JA 3).

The defendant, Armstrong, denied it, so did others at 26 Federal Plaza, but about one month after going to Congressman Rosenthal in January 1973 Richard J. De Fina received an offer of employment from the Bureau of Narcotics and Dangerous Drugs, certificate #73-010"

as accepted. Then according to the documents received under the FOIA Elizabeth May of the USCSC whose business it obviously was to see Richard J. De Fina would not get a job crossed out A and wrote N.S. (meaning non selected) on 5/16/73. (see Pre-trial Brief-p9-JA4).

The defendants, La Rocco and Monastero, abused their offices to such an extent that only Congressman

Rosenthal's insistence that it was not true compelled Richard J. De Fina to keep going back to Mr. Monastero and continuing to give more and more opportunity for them to harass friends and spread rumors in plaintiff's neighborhood.

Finally there was a change from BNDD to DEA about June at which time the DEA in July 1973 according to AUSA Gerber asked for a "full field investigation" on Richard J. De Fina.

This investigation continued to October, 1973 when a lady minister became frightened at the calls she was receiving and plaintiff's attorney called the defendants Monastero and La Rocco to stop harassing and they refused at which Richard J. De Fina's attorney threatened to go into Court and get an injunction to stop them. Agents were going into Alley Pond and all around the neighborhood. Finally on October 31, 1973, Mr. Monastero called and said Richard J. De Fina was not hired and refused to give any reasons.

to no avail, no information would be given to either plaintiff or his attorney. Under the FOIA a demand was made on Mr. Monastero who is illegally withholding plaintiff's handwritten sheet with his relatives' names on it claiming he can use this any time he wishes to prosecute Richard J. De Fina for making a false statement that Rose De Fina is his mother. Rose De Fina is plaintiff's legal mother. An appeal was made to get this handwritten

sheet and the report from BNDD and DEA and it was personally denied by defendant Levi, on April 30,1975, by letter. The defendants, Felice Pepe, of the VA has refused to answer the demand under the FOIA and insists they can give plaintiff's medical record out without his knowledge or permission and thus it was given by them to the FAA and they refused to state to whom else the VA gave plaintiff's medical file to(see affidavit of VA attorney Mr. De Leo-p. 5-in support of Government's motion to dismiss).

Richard J. De Fina seeks damages for the compiling and maintaining of false files to deprive him of the right to federal employment or any employment in his field of electronics. Richard J. De Fina seeks to be restored to the Civil Service Register and to expunge all false statements from his file particularly that he is in the FBI files as a "technical" extortionist" and in the House Committee UnAmerican file and House Committee for Internal Security. The lower Court dismissed plaintiff's action as "common law claims of libel, slander, and defanation." The Court denied Richard J. De Fina's right to unexpurgated certificates of eligibles. The Court wrongfully gave plaintiff after an in camera inspection the BNDD report dated from March 29, 1973 to April 2, 1973 when it was on July 19, 1973 that the DEA started to

make a full field investigation, according to AUSA Gerber's letter dated July 23rd, 1975. Attorney General Levi wrote plaintiff shall not have the report. AUSA Gerber on March 8, 1976 wrote to Judge Knapp that the Government withheld in its entirety the DEA report and would appeal plaintiff's getting this report. It was denied to plaintiff when on April 9, 1976, Richard J. De Fina argued for this report and it is still denied to plaintiff in its entirety. (motion to obtain DEA file ret. 4/9/74-JA 4).

Questions Presented For Review in 75 Civ. 1526 and 75 Civ. 1564

l. Was Richard J. De Fina, an honorably discharged veteran, with a disability, who was seeking employment with the CSC prejudiced, by the Court's granting Government's motion to consolidate and dismiss his two above actions with his attorney's one action, 75 Civ. 2681 (which she is not appealing) when her action was for libel and invasion of her privacy for publishing she was a disbarred lawyer with a mental problem; giving for justification her disbarment by the United States Court of Military Appeals (which court had in fact denied her the right to be heard, and never proved anything against her and so stated this in their report) and who was not and is not seeking federal employment?

The Court below answered this question in the negative.

2. Was the Court correct in discussing Richard
J. De Fina's rights under the FOIA Act with his attorney's
action 75 Civ. 2681; making them co-plaintiffs against
all the federal agencies and defendants, then in the
judgment state Richard J. De Fina's attorney did not
exhaust her administrative remedies and dismissed as
to her and as to Richard J. De Fina; Judge Knapp stated
he was not entitled to any more information and defied

discovery, injunctive, or any equitable relief? The Court below answered this question in the affirmative. 3. When Veterans Preference Act 5 USC 3318 is as follows: 3318. Competitive service; selection from certificates (a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Civil Service Commission for proper and adequate reason under regulations prescribed by the commission. (b) An appointing authority who passes over a preference eligible on a certificate and selects an individual who is not a preference eligible shall file written reasons with the Commission for passing over the preference eligible. The Commission shall make these reasons a part of the record of the preference eligible. The Commission may require the submission of more detailed information in support of the passing over of the preference eligible. The Commission shall determine the sufficiency or insufficiency of the reasons submitted and shall send its findings to the appointing authority. The appointing authority shall comply with the findings of the Commission. The preference eligible or his representative, on request, is entitled to a copy of-(1) the reasons submitted by the appointing authority; and(2) the findings of the Commission. and the veteran, Richard J. De Fina, had to make a demand under the FOIA before he could get the sustained objections were his rights under the Veterans Preference Act violated? -29-

The Court below answered this question in the negative. 4. Did the individual defendants act outside the scope of their authority and duties when they sent Richard J. De Fina an offer of a position on November 7, 1974 to correct the violation of his rights under the Veterans Preference Act about September 19, 1974? The Court below answered this questice in the negative. 5. Has a Federal Agency the right under the FOIA and the Privacy Act of 1976 to continue to maintain proven false files to the detriment of Richard J. De Fina? The Court below answered this question in the affirmative. 6. Were the federal agencies FAA and CSC guilty of denying to Richard J. De Fina his right to equal employment opportunities by the maintaining of false, derogatory files and the refusing of a hearing or the correction thereof knowing these files make Richard J. De Fina unemployable by Civil Service? The Court below answered this question in the negative. 7. Did the lower Court err in denying discovery under Rule 56 in these two actions? The Court below answered this question in the negative. -30-

8. Defendant, Attorney General Levi, the Government, and the defendants withheld in its entirety a report on the illegal surveillance by the DEA of Richard J. De Fina and his attorney (who were interviewed on October 5thm, 1973 by Mr. Shields, investigator for DEA) from July 19, 1973 to October 31, 1973. During which time the home of Richard J. De Fina and his attorney was broken into, phone tapped, mail confiscated, vandalism committed. Finally to stop the harassment of a lady minister whose name was given as a character witness Monastero was called by Richard J. De Fina's attorney. He stated he would not stop from going around the neighborhood. He was informed if he did not an injunction would be obtained to stop him. Did the Court err in requesting an in camera review of the DEA investigation conducted from July 19, 1973 to October 31, 1973 and then after the in camera review give Richard J. De Fina a redacted report of the predecessor agency, the BNDD, from March 29, 1973 to April 21973 leaving out the period from February 21, 1973 to March 28, 1973 (during which period Richard J. De Fina had been accepted by the BNDD) and by giving to Richard J. De Fina this false redacted report comply with 5 USC 5522

The Court below answered this question in the negative.

ARGUMENT

75 Civ. 1526 and 75 Civ. 1564

THE LOWER COURT PREJUDICED RICHARD J. DE FINA'S ACTIONS BY CONSOLIDATING HIS FOUR ACTIONS WITH HIS LAWYER'S ONE ACTION

Richard J. De Fina was overseas serving his country when an officer, Major Alley, asked Richard J. De Fina's counsel to do him a favor.

No fee was paid. Major Alley had contracted TB while a prisoner in Korea and all that he wanted was for Miss De Fina to try and get witnesses who knew that he got TB in the prison camp.

For this act of charity in 1958 in 1976 Richard J. De Fina's counsel found they had put herin the House Un-American file and in the House Security file (see JA 9).

The irony of this is that Richard J. De Fina's attorney phoned Major Alley now living in the West and he told her that he had gotten a security clearance and worked for the Government while she got put in the House Security File and in the House Un-American file

The details filed in these two infamous files are all false. Madeline De Fina did not represent Major Alley at any court martial and did not avertise for witnesses for his case, but for witnesses who

knew Major Alley was very ill while in the prison camp.

Add to this the false statements of Mr. Shields, pages 18-21 (supra) that Richard J. De Fina's attorney "fought the establishment" and had no friends in government, and there is no need to belabor the point that such a consolidation biased and prejudiced Richard J. De Fina's action and it was so meant to do.

CONCLUSION

The Court was wrong in answering Question One in the negative.

POINT II

THE COURT ERRED IN DISCUSSING RICHARD J. DE FINA'S RIGHTS UNDER THE FOIA WITH HIS ATTORNEY'S CASE

Again by seeking to taint Richard J. DeFina's actions by the false statements made against his attorney, Judge Knapp knowing that Richard J. De Fina's counsel sought to withdraw her action 75 Civ. 2681 refused to act on her motion. Government counsel demanded that her action remain tied to Richard J. De Fina's four actions and she, an attorney was not permitted to withdraw her action although Magistrate Schreiber said he would recommend approval of her motion to withdraw.

CONCLUSION

The Court was wrong in answering "2" in the affirmative.

POINT III

THE COURT ERRED IN REFUSING TO RECOGNIZE RICHARD J. DE FINA'S RIGHTS UNDER THE VETERAN PREFERENCE ACT

The Veteran Preference Act states that the veteran or his "representative on request, is entitled" to a copy of the objections. There is no contest on this. The request of Richard J. De Fina was denied and the right of the veteran to know why they would not hire him was concealed by the FAA and DEA for very good reasons. There was no true job offer made to Richard J. De Fina.

It was only a pretense to illegally investigate Richard J. De Fina and continue the building up of the false files.

CONCLUSION

The answer of the Court to "3" in the negative was error.

POINT IV

RICHARD J. DE FINA ADOPTS BY REFERENCE THE ARGUMENT GIVEN IN POINT III

POINT V

THE LOWER COURT DENIED ERRONEOUSLY THE RIGHT TO CORRECT OR IN ANY WAY DISTURB THE FALSE DEROGATORY FILES CREATED AGAINST RICHARD J. DE FINA

CONCLUSION

The rights of Richard J. De Fina under the

Privacy Act of 1974 were violated.

POINT VI

THE COURT ERRED IN NOT FINDING THAT THE RIGHTS OF RICHARD J. DEFINA TO EQUAL EMPLOYMENT OPPORTUNITIES IN FEDERAL GOVERNMENT HAD BEEN VIOLATED BY THE FALSE DEROGATORY FILES

The defendants are making a determined effort to continue to maintain these false files and the black-listing of Richard J. De Fina who served his country so honorably for six years and got this in return.

CONCLUSION

The Court's answer to "6" was error; it should be in the affirmative.

POINT VII

THE COURT ERRED IN DENYING DISCOVERY UNDER RULE 56 AND CLOAKING THE DEFENDANTS WITH "SOVEREIGN IMMUNITY"

It was error to give "soveign immunity" to federal employees acting outside the scope of their duties who are sued as individuals, who falsified federal records to deprive Richard J. De Fina of the right to federal employment under the Right to Equal Employment Laws. In <u>Hughes Aircraft v. Schlesinger</u>
584 F Supp 292 the Court in discussing FOIA held that sovereign immunity did not bar a woman's suit against government officials under this section to prevent disclosure of documents submitted by plaintiff to government office where actions of federal officials

were sufficiently alleged to be beyond their statutory powers and if requested relief were granted it would not expend itself on the public treasury or domain or interfere with public administration and neither would processes of government be impeded.

Richard J. De Fina sought discovery to develop facts necessary for his case and was denied this.

CONCLUSION

The Court erred in answering this question in the negative.

POINT VIII

IT IS REVERSIBLE ERROR FOR THE COURT TO HAVE APPLIED THE FEDERAL TORT CLAIMS ACT TO ALL THE FEDERAL DEFENDANTS

The plaintiff, Richard J. De Fina, in his complaint sought from the federal agencies, his rights under the FOIA and no money damages.

Not seeking money damages from the federal agencies the Federal Tort Claims Act does not apply.

Richard J. De Fina is holding the individual federal defendants responsible for money damages under the ruling of <u>Bivens vs Six Unknown Named Agents of the Federal Bureau of Narcotics</u>, supra, on page 1343 the Court stated "But we reject the claim of immunity because we do not agree that the agents were alleged to be engaged in the performance of the sort of "discretionary" acts that require the protection of immunity.

Nature of the Action 75 Civ. 2119

The only person served was Clarence Kelley as the Court refused all discovery, interrogation, or any legal way to obtain the names of the agents involved, or the name or names of his accuser, or accusers.

This action was brought against Clarence M.

Kelley, as Director of the FBI, for the complete

file maintained by the FBI on Richard J. De Fina,

and for the name, or names of Richard J. De Fina's

accusers; who caused him to be put into the FBI file

as a technical violator of the extortation law. Richard J. De Fina definitely makes the distinction(see

paragraph 5 of his complaint-JA 11) between the federal

agency and the individual defendants. From the Federal

agency protected from money damages under the Federal

Tort Claims Act he definitely states no money damages.

From the individual defendants acting outside the scope

of their duties and authority money damages in the sum

of \$1,000,000 are being asked.

Facts

75 Civ. 2119

The defendant, Clarence Kelley, refused to honor the demand made ander 5 USC 552, his aides stated to go to Court to enforce Richard J. De Fina's rights

under 5 USC 552.

Richard J. De Fina's attorney brought an action in the Eastern District Federal Court on April 30, 1975. Judge Bruchhauser of the United States District Court, Eastern District, without any notice, dismissed the action. May 1, 1975, the defendant, Kelley, sent the deleted FBI report to Richard J. De Fina.

On May 2nd, 1975 AUSA Kramer phoned Richard J.

De Fina's attorney and told her to move for reconsideration of Judge Brachhauser's dismissal as he, Mr. Kramer, was mystified as to why the Judge had dismissed the summons and complaint under the FOIA.

Richard J. De Fina at this point stated he would go pro se as he had received the deleted Ex.A from the defendant, Kelley, and as can be seen by the Ex. his attorney was part of the false file. In his answer in the action 75 Civ. 2119 AUSA Gerber makes it appear that having lost out in the Eastern District, we immediately without appealing went into the Southern District on the same course of action. This is untrue. The action in the Eastern District was solely against the FBI for refusing to give any information whatsoever. The action in the Southern District is for filing this false report with the CSC at 26 Federal Plaza, New York City, and Richard J. De Fina was going into the District Court where the false records are actually filed.

No sooner had Richard J. De Fina served his

complaint (JA 11) then the Long Island Press May 14, 1975, with one-half inch black banner headlines, gave the information to the public. A distilled version making his background more unsavory by the statements made in the article. Hence the information is now public and the need for an injunction is apparent.

The facts in this case are very simple. Richard J. De Fina made a phone call about February 18, 1960 why his attorney was being shut off by the Clerk of the United States Court of Military Appeals. His attorney could not find out if she was going to have the right to be heard on a disbarment that would tarnish her reputation and her professional standing. He also was shut off.

The next day two agents, Barry and Henry, first name unknown, whereabouts unknown, came to the house and questioned Richard J. De Fina, if he ever made the phone calls. He stated the truth that the Court Clerks would shut off the minute they heard his attorney's name. To prove this to the FBI agents Miss De Fina made a phone call and the woman clerk at the other end yelled loud enough for the agent to hear her voice that Miss De Fina had been ordered not to call the Court.

At this the agents said to forget it and believing that the agents were acting in good faith and not outside the scope of their authority as now it unquestionably appears, Richard J. De Fina "forgot it."

After this strange events happened and happened for 10 years. Richard J. De Fina would get employment, something would go wrong, and he would be forced out of his position, or else he would be told a background investigation would be made; but he was definitely acceptable to the interviewers. When Richard J. De Fina received Ex. A attached to the complaint it was clear what had happened. The agents who came to his home according to Ex. A never made any official report, stating that if the phone call had been made it could not be proven.

The report(Ex. A) continues that despite this an AUSA made him a technical violator of the extortion laws. This FBI report, with very false derogatory statements against both him and his attorney as to their mental condition and emotional state, followed him all these years.

The Proceedings in the Court Below 75 Civ. 2119

Judge Knapp consistently refused any relief to Richard J. De Fina. September 16, 1975 Richard J. DeFina appeared with his attorney for what he believed was a pre-trial hearing. Judge Knapp stated that he would appoint a magistrate and the case might go to the Grand Jury. A magistrate was appointed who refused

to act in the case, after setting it down for a hearing on October 9, 1975 (JA 3).

All the motions made in this case 75 Civ. 2119
were marked "withdrawn as moot" after Judge Knapp
consolidated this action with his attorney's action.
A motion made objecting to the phrase "withdrawn as
moot" and requesting a decision of granted or denied,
was on April 26, 1976, changed to "dismissed as moot,"
(JA 11).

ARGUMENT

75 Civ 2119

POINT I

THE COURT ERRED IN DENYING APPELLANT HIS RIGHT TO DISCOVERY UNDER RULE 56

Plaintiff was denied the right to discovery even while government counsel admitted in his brief that the FBI had more on Richard J. De Fina then they had revealed.

Plaintiff had been refused the names of his acusser or acussers for a heinous crime of extortion, who can say if there ever was an acusser?

There can be no question that the FBI went around the neighborhood, gave the "technical" guilty of extortion.

This a case where defamatory falsehood made substantial damage to reputation and right to works apparent. No decision need be given on how the defendants destroyed the livihood of this plaintiff appellant for 15 years.

The accusation against Richard De Fina was neither proved nor admitted. The FBI did not discover any evidence to justify its investigation. An AUSA in

Washington, D. C. attempted to justify the initiation of the FBI investigation by conjecting that due to Mr. DeFina's mental and emotional condition during the alleged "crime" prosecution was not warranted.

What was his mental condition? He was very calmly studying when the agents arrived. He was neither excited or emotional. He was asked if he made a threatening phone call. He denied it, then they told him to forget it. At no time was extortion mentioned.

I do not believe there was any acusser, I say this as counsel for Mr. Richard DeFina. I believe the whole vicious affair was made up to punish him for making a phone call when the Court was determined to give no information. The FBI then notified, military police, Washington, D. C. police, New York City police, it is a wonder they did not call out the Army and the Navy.

Them again was it the FBI? Was it the Justice Department or was it the U.S.Court of Military Appeals? How strange that the injustice and depriving Mr. DeFina of his constitutional right to know the name of his accuser was started by the very ones entrusted with the administration of justice.

The FBI did publish to the CSC that he had an unsavory background, etc. A young man in his twenties, returning from serving his counstry, then this is done to him. Who caused the Long Island Press to put it in their Newspaper with Banner headlines?

Discovery should never have been denied to

this appellant, Richard J. De Fina.

In Bivens v. Six Unknown named agents of the Federal Bureau of Narcotics, 150 F 2d 1339 it was stated: p. 1341:

The decision of the Supreme Court 403 U.S. 388, establishes for the first time since the founding of the Republic the federal common law right of an aggrieved person to sue for damages...we into consideration (1) the theoretical basis for immunity of federal officials generally (2) the impact of the Civil Rights Act, Section 1983 42 USC Section.. and the desirability of formulating a federal rule that applies on the same term to both state and federal police officers and (3) the rule of liability of a police officer at common law.

FRCP Rule 16 entitled Mr. De Fina to discovery. The right to know who has put him into an FBI file is particof due process of law in this country. Justice Douglas made a strong appeal for a person who is slandered and accused of crime should know their acusser.

In the <u>Privacy Act of 1974</u>, Public Law 93-579
5 USC 552a Congress gave reasons for the need of this law
and stated:

"...to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted acess to records concerning them which are maintained by Federal agencies to establish a Privacy.... Sec. 2(a) The congress finds that (1) The privacy of an individual is directly affected by the collection, maintenance, use and affected by the collection, information by dissemination of personal information by Federal Agencies..."

Government attack on good name, reputation, honor and community standing can be deprivation of liberty

under the 14th and 5th Amendment of the U.S. Constitution.

In Bivans v. Six Unknown Named Agents of the Federal Bureau of Narcotics (Supra) the Court held against the agents and for plaintiff's right to damages and stated in part:

"Thus the real question to be asked is whether or not federal officers performing police duties warrant the protection of the immunity defense. We hold that they do not."

In Chastain v. Clarence M. Kelley, 510 Federal Reporter, 2d Series, it was held that the Federal Courts are empowered to order the expungement of government records where necessary to vindicate rights secured by the Constitution or by statute.

CONCLUSION

Plaintiff-appellant, Richard J. DeFina, should be given the name of his acusser, the undeleted files, and these files ordered expunged from the files.

What Is Being Appealed 75 Civ. 2362

Richard J. De Fina adopts by reference p. 4 as to 75 Civ. 2362, and p.p. 5, 6 as to 75 Civ 2362 and the denial of the correction of the false federal records made by the federal and non-federal defendants.

The Nature of the Case

75 Civ. 2362

Richard J. De Fina is asking the federal agency, USCSC to correct the false files created and maintained against him by the federal defendant, Ritchey Williams, acting outside the scope of his duties and authority. The correction of these false federal files will entitle Richard J. De Fina to be restored to a position with the Customs Department, which he lost by the creation of these false files (see paragraph VI of the amended complaint-JA 13).

No money damages are requested as against the federal agency. As against Ritchey Williams acting outside the scope of his authority, and the non-federal defendants, Richard J. De Fina is asking the sum of \$1,000,000.

Facts

75 Civ. 2362

Defendant, ITT Federal Laboraties, now dis-

solved and whose employment records are maintained in Paramus, New Jersey, where Richard J. De Fina's false employment record is kept, maintained and given out to contradict his true employment dates, which are from September 17, 1962 to July 13, 1964; then he was laid off for lack of work and rehired on or about June 7, 1965 and forced to resign on July 8, 1965.

According to all the defendants Richard J.

De Fina is guilty of false employment dates as one after the other insists Richard J. De Fina's employment dates are from July 1964-July 1965 when actually Richard De Fina did not work for ITT as he was laid off July 1964 to June 7, 1965 when he was called back, and then forced to resign as he was attending college and his shift was changed to the night shift.

In addition these defendants made him the illegimate child of a disbarred lawyer who is a mental case, etc. (see amended complaint JA 13).

These false records are kept by the USCSC who refuse to correct same causing Richard J. De Fina to be accused of making false statements when he asserts the truth as to his employment dates, and as a result he is unemployable in his field of expertise, electronics (JA 13).

January 1971 Richard J. De Fina took a "walk in" test given by the Treasury Department, Bureau of Customs,

with the understanding if anything was derogatory in his background he would be dismissed (amended complaint-paragraph 8-JA 13).

Richard J. De Fina was sworn in as a U.S. Marshal in the Sky Marshal program and went into training, and was about to graduate when on February 9, 1971, he was told his vision did not meet requirements and he would be dismissed if he did not resign. Richard J. De Fina resigned on February 10, 1971.

On or about May 14, 1975, Richard J. De Fina received forty-seven pages of deleted material under the FOIA. These documents revealed the true reason for plaintiff's forced resignment. (see Ex.Al to A5) attached to amended complaint JA 13.

These false statements by the defendants were secretly filed by the federal defendants on February 9, 1971, the night Richard J. De Fina was forced to resign (paragraph 15-amended complaint JA 13).

Proceedings in the Court Below 75 Civ 2362

The defendant, Minogue, made personal service difficult by appearing, then contesting his appearance on the grounds he had moved to California.

On September 16, 1975, the case was noticed with Richard J. De Fina's other three cases for a pretrial conference.

In Richard J. De Fina's pre-trial conference

he submitted a memorandum. Paragraph 8 stated that paragraph "5" of the amended complaint had to be amended as the defendant, Minogue, was a "citizen" of San Diego, California.

Then Minogue was personally served with the amended complaint in California on 9/22/75(JA 13).

In October Richard J. De Fina's counsel received oral notice that a hearing was to be held on Oct. 9, 1975.

As soon as the hearing opened Magistrate
Schreiber angrily told Mr. Goldberg, attorney for
ITT that he could dismiss the action if he had interposed the right defense.

Then he informed Richard J. De Fina he was withdrawing and a new magistrate would be appointed, but instead of leaving he started to discuss with AUSA how could he expect Judge Knapp to grant his motion to dismiss when Richard J.De Fina's case had such merit, and how would he, Gerber, like to have in his file that he was illegimate.

At this counsel for Richard J. De Fina requested to know "what motion?" Nobody answered. October 15, I got the motion and brief that Gerber had filed and had not given me a copy of.

Richard J. De Fina started to show his evidence in the FBI case and Judge Schreiber refused to look at it and rushed from the Courtroom (see motion to

compel Schreiber to report ret.-filed January 30, 1976 (JA 3)

Judge Knapp refused to pass on this motion and marked it "withdrawn as moot."

De Fina incorporates by reference pages 5,6(supra).

Ell the minogue papers became lost including the marshall's personal service on Minogue, and Richard J.

De Fina's counsel had to make a motion to file true copies of the marshal's return, the summons, and amended complaint served on Minogue, Minogue's answer to the amended complaint and the ITT and Minogue motion(see motion and copies filed(JA 15)

75 CIV. 2362

ARGUMENT

POINT I

THE LOWER COURT ERRED IN DISMISSING THE COMPLAINT AGAINST THE DEFENDANT, MINOGUE, ON THE GROUND THAT CPLR 302 EXEMPTED HIM FROM SERVICE AS THE ACTION SOUNDED IN DEFAMATION

Judge Knapp stated in dismissing the action against the defendant, Minogue, who is a citizen of California and works for ITT, as its Industrial Manager, (ITT is based in New York City) that he was exempted from service in this action as it sounded in defamation.

Minogue, committed the falsifying of federal records in New York. The falsified records are filed with the CSC. As a result of the false federal records Richard J. DeFina lost his Sky Marshal job.

In Totero v. World Telegram Corp. The Court stated: (41 Misc. 2d 504)"The action is in defamation but the claimed source is the doing of business here, out of which the action arose. Due process is satisfied if a defendant have certain minimum contacts within the territory of the forum so that the maintenance of the suit does not offend traditional notions of fair play and sustantial justice. International Shoe Co. v. Washington, 326 U.S. 310; McGee v. International Life Ins. Co.

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75 Civ. 2362

Point II

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN THIS ACTION

The Court erred in granting summary judgment and denying discovery or a hearing in this action.

Richard J. De Fina made an attempt before Judge Knappto offer into evidence his pay check stubs to prove the dates he gives for his employment with the defendant, ITT, were correct: that he worked from September 17, 1962 to July 13, 1964, and from June 7, 1965 until July 8, 1965 when he was forced to resign as he was put on the night shift and did not want to leave City College which he was attending at night.

He offered a letter signed by J.F. Connington, Personnel Manager, dated February 15, 1965, during the period that he was laid off due to lack of work.

Mr. Connington gave him a recommendation that he worked for ITT from 9/17/62 to 7/13/64 and was considered to be a good conscientious employee and is recommended for employment."

Richard J. De Fina also offered a letter dating back to 1963 when the defendant, Mr. Minogue, was stating that Richard De Fina was illegimate. The letter of his attorney requested of Mr. Benino that he make Mr. Minogue stop.

He attempted to offer a letter to show back

in 1963 Defendant's, Minogue's, hatred for Richard J. De Fina's sister, Madeline De Fina, whom he had never met (see complaint-paragraph 19-VA 13).

Judge Knapp refused to look at the evidence stating a magistrate would be appointed.

On October 9, 1975, except to look for a reason to dismiss the complaint as to ITT, Magistrate Schreiber refused to look at the evidence about him. The defendants were threatening Richard J. De Fina with prosecution for false dates insisting he worked for ITT from June 7, 1964 to July 8, 1965, and had about five names deleted all giving the same false statements about his employment dates to the CSC; see Ex. Al to amended complaint (JA 13) which states "period covered July 1964 to July 1965. Discrepancy in claimed dates of employment."

It was error to grant summary judgment when there existed triable issues of fact, and the Government and the non-federal defendants failed to demonstrate the absence of any material factual issue genuinely in dispute. The District Judge erred in refusing to permit Richard J. De Fina to show his pay stubs, and other evidence that ITT and the government had fraudulently changed Richard J. De Fina's employee's dates and other facts to discredit and deny to him the right to equal employment opportunities, and to eventually put him in a blacklist file maintained by the USCSC known as the "62" file.

Richard J. De Fina submits that the falsifying of federal records and papers by the individual
non-federal and federal defendants were actionable
wrongs and were done while abusing their official
authority. Bivens v. Six Unknown Agents of the Federal
Bureau of Narcotics, 456 F 2d 1339.

In the October 28, 1975, issue of the New York Law Journal it is stated:

"Chief Judge Irving R. Kaufman, in his opinion for the three-judge panel, emphasized to the district judges that under a prior court holding "the fundamental maxim" remains thaton a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried."

Spirit of Rule
Furthermore, Judge Kaufman
said in the decision, Heyman v.
Commerce and Industry Insurance
Company 75-7230 Oct. 24, "when
the court considers a motion
for summary judgment, It must
resolve all ambiguities and
draw all reasonable inferences
in favor of the party against
whom summary judgment is sought."
This, he emphasized, is the "spirit"
of Rule 56 of the Federal Rules of
Civil procedure.

Rule 56, he explained, is merely a "tool" under the summary judgment procedure" which enables the court to determine whether the "curtain" should rise at all" and whether a trial is warranted. Concurring in the opinion were Judges Henry J, Friendly and J. Joseph Smith."

There were triable fasues and it was reversible error to deny discovery.

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POINT III

THE COURT ERRED IN DISMISSING THE COMPLAINT AGAINST ITT FEDERAL LABORATORIES FOR LACK OF DIVERSITY JURISDICTION

The action against the defendant ITT Federal Laboratories was a Federal Question and the Court had original jurisdiction in this case.

The non-federal defendants used their standing with the Federal government to falsify federal records to discredit Richard DeFina truthfulness by changing his employment dates from September 17, 1962 to July 13, 1964, when he was laid off due to lack of work and from about June 7, 1965 to July 3, 1965 (when his shift was changed from day to night and he had to resign as he was attending college at night) to July 1964 to July 1965.

In addition they made his parantage dubious and caused him to be forced to resign from his Sky Marshal position when they finished with their false records the day of February 9, 1971. That very evening he was told that due to his eye sight he had to resign.

The federal defendant violated and still violates Richard DeFina's rights under 5 U.S.C. 552 and 552a in that with the Court's ruling the false records have been approved for dissemination. This is error.

POINT 1V

THE COURT VIOLATED RICHARD J. DE FINA'S RIGHTS UNDER 5 U.S.C. 552 and denied HIM DUE PROCESS OF LAW IN SO DOING

5 U.S.S. 552 2 (D) states:

(D) Except as to cases the court considers of greater importance, proceedings before the district courts, as authorized by this subsection, and appeals therefrom take precedence on the docket over all cases and shall be asssigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

From March 27, 1975 to May 20, 1976 for more than one year, Richard J. De Fina was unable to get employment due to the FBI and CSC records and made many motions to speed up a decision in his four cases, to no avail. The court was not moved and the damage done by the continuing keeping of these records is irreparable.

CONCLUSION

It is therefore respectfully submitted that the judgment entered on the 20 day of May 1976, should be reversed and the complaints reinstated. Respectfully Submitted:

/// MA DELINE DE FINA,

Attorney for Appellant.

UNITED STATES ATTORNEY